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CASE LAW ON UNCITRAL TEXTS
(CLOUT)

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INTRODUCTION

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1). CLOUT documents are available on the website of the UNCITRAL secretariat on the Internet (http://www.un.or.at/uncitral).

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I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 226: CISG [4(a)]
Germany: Oberlandesgericht Koblenz; 5 U 534/91
16 January 1992
Original in German
Published in German in [1992] Recht der internationalen Wirtschaft 1019; [1994] Praxis des internationalen Privat- und Verfahrensrechts 46; and Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts im Jahre 1992 (No. 72)
Abstract in Italian in [1994] Diritto del Commercio Internazionale (No. 34), 852
Commented on in German by Schurig in [1994] Praxis des internationalen Privat- und Verfahrensrechts 46

A Dutch seller, plaintiff, sold a yacht to a German company. Under the contract, the seller retained title to the yacht ("retention of title"). The yacht was subsequently transferred to the defendant, a silent partner of the German company. When the German company was declared bankrupt, the parties disputed the validity of the "retention of title" clause.

The court held that the CISG did not apply to the validity of a "retention of title" clause.

Case 227: CISG 8(2); 18(1); 19(1); 52; 61(1)(b); 64(1)(a); 74; 75; 76; 77; 78
Germany: Oberlandesgericht Hamm; 19U 97/91
22 September 1992
Original in German
Published in French by Claude Witz, [1995] Les premières applications jurisprudentielles du droit uniforme de la vente internationale-Convention des Nations Unies du 11 avril 1980, Librarie Générale de Droit et de Jurisprudence (L.G.D.J.), Collection Droit des affaires (Paris) 142
Abstract in German in [1993] Oberlandesgerichtsrechtsprechungs-Report Hamm 27

A German buyer, defendant, offered to purchase ten lots of "wrapped" bacon from an Italian seller, plaintiff. The seller's reply to the buyer's offer referred instead to "unwrapped" bacon. However, in its reply to the seller, the buyer did not object to the change in terms. After four lots had been delivered, the buyer refused to accept further deliveries. Therefore, the seller declared the contract avoided and sold the remaining six lots at a price much lower than both the market- and the agreed purchase- price. The seller claimed damages, the outstanding purchase price and interest.

The court held that the seller's reply to the buyer's offer was a counter-offer (article 19(1)CISG) and not an acceptance (article 18(1) CISG), and that the buyer's reply to the counter-offer, inasmuch as it did not contain any objections to the change in terms, should be considered an unconditional acceptance (article 8(2) CISG). Consequently, the seller was entitled to declare

the contract avoided because the buyer's failure to take delivery of more than half of the goods constituted a fundamental breach of contract (article 64(1)(a) CISG).

The court also held that the seller was entitled to claim damages (articles 61(1)(b) and 74 CISG). To assess damages, priority had to be given to the method of calculation under article 75 CISG. In mitigating its loss, however, the seller was obliged to undertake a profitable resale of the goods (article 77 CISG). As the seller had been unable to resell the goods for more than the market price, i.e. the market price at the place of delivery rather than that at the seller's place of business, the method of calculation under article 76 CISG was applied. Lastly, the court granted the outstanding purchase price (article 52 CISG) and interest (article 78 CISG).

Case 228: CISG 1(1)(a); 1(1)(b); 53; 58(1); 78; 92(2)
Germany: Oberlandesgericht Rostock; 1 U 247/94
27 July 1995
Original in German
Published in German in [1996] Oberlandesgerichtsrechtsprechung Rostock 50

A Danish seller, plaintiff, delivered bedding plants to German buyers, defendants. When the buyers did not pay the invoices, the seller engaged the services of a debt collection agency. However, the debt collection agency was unable to recover from the buyers the sum concerned. The seller's claim for the purchase price and interest as well as for the expenses incurred by the debt collection agency was granted by the lower court. The buyers appealed the decision.

The appellate court held that the buyers were bound to pay the purchase price (article 53 CISG), the CISG being applicable under its article 1(1)(a), since Denmark and Germany were both Contracting States, and also under article 1(1)(b) CISG. But, Denmark had made a reservation under article 92(2) CISG such that it was not bound by Part II (Formation) of the CISG. Therefore, under the German rules of private international law, the formation of the parties' contract was governed by Danish law, according to which a binding contract existed between the parties.

Furthermore, the appellate court also held that interest on the purchase price was owed (article 78 CISG). The only condition on the obligation to pay interest was that the purchase price under the contract must be due and payable (article 58(1) CISG). And, as the CISG does not regulate the rate of interest, this rate was determined according to national law selected under the rules of private international law, which resulted in the application of Danish law.

Lastly, the appellate court overturned the lower court's decision regarding the expenses incurred by the debt collection agency inasmuch as such expenses do not fall within the ambit of the CISG.

Case 229: CISG 6; 38(1); 39(1); 49
Germany: Bundesgerichtshof; VIII ZR 306/95
4 December 1996
Original in German
Published in German in [1997] Neue Juristische Wochenschrift-Rechtsprechungsreport 690
Abstract in German in [1997] Entscheidungen zum Wirtschaftsrecht 653 and in [1997] Wirtschaftsrechtliche Beratung 602
Commented on in German by Schlechtriem/Schmidt-Kessel in [1997] Entscheidungen zum Wirtschaftsrecht 653

A German seller sold to an Austrian buyer a computer printing system that comprised a printer, monitor, calculator and software. The seller delivered the printing system to the buyer. Then, the buyer gave to the seller written notice of eight deficiencies, including the absence of "documentation concerning the printer", and provided an additional period of time for the seller to rectify these deficiencies. The seller sent to the buyer the printer documentation (i.e. as a single apparatus). Nonetheless, the buyer declared the contract avoided, referring to the deficiencies previously notified, but without mentioning the receipt of the documentation on the printer as a single apparatus. The seller assigned its rights under the contract. The assignee, plaintiff, sued the buyer, defendant, for payment of the purchase price. On appeal, the trial court's decision in favour of the plaintiff was reversed. The plaintiff appealed further.

Under the contract, the warranty between the seller and buyer had priority over the provisions of the CISG (article 6 CISG). However, because the warranty did not address either the period for examination of the goods, the specifications as to the deficiencies that were to be given in the notice or the reasonable time to give such notice, these matters remained governed by articles 38(1) and 39(1) CISG.

The court held that although notice by the buyer was given in time, it did not clearly specify whether the missing documentation was in respect of the entire printing system or merely the printer as a single apparatus. The seller, however, had understood the missing documentation as relating solely to the printer as a single apparatus. In order to fulfill the requirements of article 39(1), the buyer had to have described the lack of conformity with sufficient specificity so as to avoid any misunderstanding (article 39(1) CISG).

The court also held that, based solely on the claim of missing documentation, the buyer's avoidance of the contract was not effective (article 49 CISG). The court, therefore, remanded the case back to the first appellate court.

Case 230: CISG 1(1)(a); 1(1)(b); 7(1); 38(1); 39(1); 40; 44; 80
Germany: Oberlandesgericht Karlsruhe; 1 U 280/96
25 June 1997
Original in German
Published in German in [1998] Der Betriebsberater 393 and [1998] Recht der Internationalen Wirtschaft 235
Abstract in German in [1997] Entscheidungen zum Wirtschaftsrecht 785
Commented on in German by Schlechtriem in [1997] Entscheidungen zum Wirtschaftsrecht 785

A German seller, defendant, delivered surface-protective film to an Austrian buyer, plaintiff, for use by the buyer's business partner. The buyer did not test the film, which had to be self-adhesive and removable. When the film was removed from polished high-grade steel products, it left residues of glue on the surface. Upon being so advised, the buyer notified the seller the next day. However, this notice was given 24 days after the film had been delivered. The buyer paid the expenses of removing the glue residue and brought a claim for reimbursement of these expenses against the seller.

The CISG was applicable under both articles 1(1)(a) and 1(1)(b) CISG.

The court dismissed the buyer's claim, noting that, for durable goods, a reasonable period for examination would be 3 or 4 days (article 38(1) CISG), the extent and intensity of examination being dependent upon the type of goods, packaging and testing possibilities. Although there had been long-standing business relations between the parties, spot-checks and test treatments were required where the lack of conformity would have become evident only upon use. As subsequent testing indicated, had the buyer begun tests within 3 or 4 days after delivery, the defect would have been discovered within 7 days. For durable goods, notice should be given to the seller within 8 days after the lack of conformity ought to have been discovered. Therefore, as notice was given after the expiry of a reasonable notice period, the buyer lost its right to rely on the lack of conformity (article 39(1) CISG). Moreover, although under article 44 CISG the buyer could raise a reasonable excuse for failure to give the required notice in accordance with article 39(1) CISG, the former article did not apply to a failure to examine in keeping with article 38(1) CISG.

Further, the court held that it was insufficient that the seller had knowledge of the glue glazing. The buyer had to prove that the seller knew this would constitute a lack of conformity (article 40 CISG). By negotiating over the lack of conformity, the seller did not forfeit its right to plead that notice was given out of time. Taking into consideration the principle of good faith, such forfeiture could only be recognised if special circumstances so indicate (articles 7(1) and 80 CISG).

Case 231: CISG 6
Germany: Bundesgerichtshof; VIII ZR 130/96
23 July 1997
Original in German
Published in German in [1997] Der Betriebsberater 1860, in [1997] Zeitschrift für Insolvenzpraxis 1933 and in [1997] Neue Juristische Wochenschrift 3304
Commented on in German by Eckhard Wolf, "Die Rechtsprechung des Bundesgerichtshofs zum Kaufrecht" in [1998] Wertpapier Mitteilungen (Part 4): [1998] 47 Zeitschrift für Wirtschafts- und Bankrecht 41 (special issue no. 2)

An Italian seller, plaintiff, agreed to deliver fashion textiles to a German buyer, defendant.

As the parties had chosen the application of German law to the exclusion of the CISG under Article 6 CISG, the court did not consider the CISG applicable.

Case 232: CISG 1(1)(a); 4(a); 18; 38(1); 39(1); 40; 49; 50; 53
Germany: Oberlandesgericht München; 7 U 4427/97
11 March 1998
Original in German
Abstract in German in [1998] Entscheidungen zum Wirtschaftsrecht 549
Commented on in German by Schlechtriem in [1998] Entscheidungen zum Wirtschaftsrecht 549

A German buyer, defendant, ordered cashmere sweaters from an Italian seller, plaintiff. The seller sued the buyer for the outstanding purchase price. The buyer sought set-off, claiming that it had notified the seller that the sweaters were defective.

The court held that the CISG was applicable and that the seller was entitled to the purchase price under the CISG (articles 1(1)(a) and 53 CISG). The buyer's set-off claim was not granted as set-off claims are prohibited under the Standard Conditions of the German Textile and Clothing Industry, which the parties had made applicable to their contract (article 18 CISG). The set-off issue was to be determined in accordance with German law (article 4(a) CISG).

In addition, the court held that the buyer could not declare the contract avoided (article 49 CISG) or reduce the purchase price (article 50 CISG). The buyer had lost the right to rely on the alleged lack of conformity of the goods as it should have examined the goods within as short a period as the circumstances required (articles 38(1) and 39(1) CISG). The parties had agreed to set this period for examination at two weeks by incorporation of the Standard Conditions and the buyer failed to comply with that agreement.

Moreover, the court stated that application of article 39(1) CISG could not be excluded by operation of article 40 of the CISG, which would have been applicable only if the seller had overlooked obvious defects in the goods that could have been detected through the exercise of

ordinary care. In this case, since the buyer had distributed the goods to its own customers, the goods were clearly neither unusable nor unsaleable.

II. CASES RELATING TO THE UNCITRAL MODEL ARBITRATION LAW (MAL)

Case 233: MAL 35(1); 36(1)(b)(ii)
Zimbabwe: Harare High Court (Judge Chatikobo); Judgment No. HH-133-97
10 July and 20 August 1997
Durco (Pvt) Ltd v. Dajen (Pvt) Ltd
Original in English
Published in English in 1997(2) Zimbabwe Law Reports 199 (Harare)

Two parties, a grain producer and a miller, had submitted their dispute to a single arbitrator which resulted in an award in favour of the miller. As a third party was involved who had not been a party to the arbitration, it was feared that further proceedings might ensue. Accordingly, it was felt to be in the interests of all concerned to submit to a second arbitration which would be binding on all three parties.

The second arbitration, before a panel of three arbitrators, however, resulted in an award against the miller. The miller refused to comply with the second award and the grain producer applied to the High Court for its recognition and enforcement under article 35 MAL. The miller opposed the award on the grounds that it would be contrary to public policy to enforce the award in terms of article 36(1)(b)(ii) MAL, contending that since there was already an award it would offend the principle of finality in arbitration to enforce the second award.

The court held that, by agreeing to submit to a second arbitration, the miller had waived its rights to finality of the first award. Accordingly, the miller was now bound by the second award and the court ordered that it should be recognised and enforced. The miller appealed (see CLOUT case no. 234) to the Supreme Court.

Case 234: MAL 35(1); 36(1)(b)(ii)
Zimbabwe: Supreme Court of Zimbabwe (Judges of Appeal: Muchechetere, Ebrahim and Sandura); Judgment No. SC 141/98
22 June and 7 September 1998
Dajen (Pvt) Ltd v. Durco (Pvt) Ltd
Original in English
Unpublished

The miller, the unsuccessful party in CLOUT case no. 233, appealed to the Supreme Court. In dismissing the appeal, the Supreme Court held that the principle of finality did not

destroy or supplant a party's power to waive any right derived from an award and that this is what the miller had done by submitting to the second arbitration.

III. ADDITIONAL INFORMATION

Document A/CN.9/SER.C/ABSTRACTS/18

Addendum

(Arabic, Chinese, English, French, Spanish and Russian texts)

Case 222

Published in English in: 37 International Legal Materials 1141 (1998)

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